AN APPELLATE PRIMER:

The ABC's of Appeals, Special Actions, & Post-Conviction Relief

May 4, 2012
Black Canyon Conference Center
Phoenix, Arizona

DEFENDANT'S APPEALS

Presented By:

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Distributed By:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL
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DEFENDANTS' APPEALS

I. *OVERVIEW*

A) Attorney General's Office represents the State in all felony appeals filed by criminal defendants (as well as misdemeanor convictions in superior court)

1) Also in cases where defendants charged with felony in Superior Court, but convicted of misdemeanor

2) Attorney General also represents the State in federal habeas corpus proceedings—normally following both direct appeal and state post-conviction relief proceedings

B) Division Broken up into Criminal Appeals and Capital Litigation

1) 23 attorneys in Criminal Appeals—16 in Phoenix, 7 in Tucson

2) 11 attorneys in Capital Litigation—7 in Phoenix, 4 in Tucson

II. *PROCESSING APPEALS*

A) Criminal Appeals – Non- Capital

1) Section Chief reviews and rates opening briefs as they come in, then assigns to individual attorneys

a) Non-capital cases are not assigned until *after* Opening Brief is filed

i) Any questions or concerns about a case prior to filing of Opening Brief, call Joe Maziarz (542-8584), and follow up with letter for the file

b) After case is assigned, letter is sent out to trial prosecutor, identifying the assigned appellate attorney, and seeking input and requesting copies of all recordings played at trial

i) Appellate attorneys are encouraged to contact trial prosecutors if there are problematic issues which may result in reversal or significant reduction of sentences

2) Review Process

a) 3 unit chiefs in Phoenix, 1 in Tucson

i) Each unit chief reviews 4 to 6 attorneys and maintains approximately ¾ caseload

ii) Review process is a combination of proofreading, ensuring that correct arguments—including forfeiture and alternative harmless error–are made, ensuring that we are making consistent arguments throughout the section, and evaluation of work product

b) Time for Filing Answering Briefs

i) 40 days after service of Opening Brief (plus 3 days for mailing)

ii) Automatic 28-day e-mail extension in Division One

iii) Division Two requires a written motion for extension but always grants a first 30-day extension

3) Oral Argument

a) Rarely requested and rarely granted

b) Perhaps one out of 30 to 40 cases

c) Normally has little impact on decision

4) Decisions

a) Normally 2 to 3 months after Answering Brief filed

b) Approximately 90 to 95% memorandum decisions

B) Capital Appeals

1) Generally assigned to appellate attorney shortly after notice of appeal is filed

2) Appealed directly to Arizona Supreme Court

3) Although multiple issues are usually raised—particularly relating to sentencing—the law is pretty well settled on most issues

4) Automatically set for Oral Argument

III. *PETITIONS FOR REVIEW—NON-CAPITAL*

A) State prevails in approximately 95% of cases

1) Far more petitions for review filed by defendant

2) Less than 5% granted

3) Response by State

a) We respond in all published opinions or if there is a dissent

b) Generally file notice of acknowledgment in memorandum decisions, unless the attorney feels a response is warranted

i) Misstating the issues or holding of the court of appeals

ii) Blatantly misstating the facts in a way that undermines the trial court's or court of appeals' ruling

c) Arizona Supreme Court will order a response if it is considering granting review and we filed notice of acknowledgment

B) State's Petition for Review

1) Opinions

a) If we believe court of appeals committed a legal error, we will normally file

b) Best to have a conflict with another panel of court of appeals, or conflict with Arizona Supreme Court opinion

c) Unlikely to petition if court of appeals found an abuse of discretion by trial court—there normally must be a clear legal error

2) Memorandum Decisions

a) Very unlikely we will petition because Arizona Supreme Court is not inclined to engage in error correction in an unpublished decision

b) More likely to petition if there is a conflict

c) May petition if we believe court of appeals was wrong and a particularly egregious case—grant still unlikely

3) State's Success Rate considerably higher than Defendants' in having review granted

a) Roughly 30 to 40 %

b) Supreme court will sometimes depublish a court of appeals opinion, and deny review

c) If Review is granted:

i) Supreme court almost always orders optional supplemental briefing
ii) Court will almost always set the case for oral argument

IV. *PETITIONS FOR CERTIORARI*

A) *Very* rarely sought
1) There must be a *clear* federal constitutional issue to even consider filing
2) Normally must have a conflict amongst the federal circuit courts or state courts
a) Supreme Court will generally allow conflicts to "percolate" for a while before resolving
b) The more courts to weigh in and the closer the division, the more likely Supreme Court will take case
3) Supreme Court is *not* an error-correction court
a) Even if Arizona Supreme Court or Court of Appeals decision is in direct conflict with Supreme Court precedent, unlikely to grant
b) Must have a "hook"—conflict or issue that interests four justices

V. *CROSS-APPEALS BY STATE*

A) State may file notice of cross-appeal within 20 days after service of notice of appeal
B) Notice of cross-appeal should specify the issue(s) State is appealing
C) Not clear whether Attorney General or County Attorney handles cross-appeal
1) Attorney General almost always does
2) Appellate attorney will likely confer with trial attorney to determine whether to pursue or dismiss cross-appeal
3) If Attorney General opts not to pursue, County Attorney may do so
D) Court of Appeals will *not* review a *conviction* issue raised in cross-appeal unless it reverses conviction
1) If there is a sentencing issue on cross-appeal, it generally must address the issue

VI. *FEDERAL HABEAS CORPUS*

A) Follows direct appeal and, usually, state post-conviction relief

B) Procedural Bars are *very* important

1) State must assert all time and procedural bars in post-conviction relief proceeding and make sure trial court expressly finds the procedural bars

a) Can prepare proposed findings expressly stating procedural bar

b) *Alternative* rejection of the merits is okay (*Harris v. Reed*, 489 U.S. 255 (1989))

2) Other than ineffective assistance of counsel and newly-discovered evidence claims, virtually *all* other claims should be *precluded* because the claim was, or *could have been*, raised on direct appeal – make sure to assert it

C) Ineffective Assistance of Trial Counsel most prominent habeas claim

1) Always best to have an evidentiary hearing in state courts on colorable claims

a) We get the benefit of deference on *both* factual *and* legal findings in federal court

b) If there is no hearing in state court, unclear if we get any deference or whether federal court must presume defendant's factual allegations are true (*Cullen v. Pinholster*, 131 S. Ct. 1388 (2011))

D) AEDPA requires deference

1) Federal court can only grant relief if it finds that the state court's resolution of the federal issue is directly contrary to, or an unreasonable application of, clearly established Supreme Court precedent

a) If there is no relevant Supreme Court precedent, the writ may not issue

2) If state court rejected an ineffective assistance of counsel – it is entitled to "double deference" (*Harrington v. Richter*, 131 S. Ct. 770 (2011))

a) Encourage trial court to make an alternative finding of no prejudice under *Strickland*, so that we get deference on *both* the performance and prejudice prongs

VII. *PRACTICE POINTERS*

A) Put everything on the record – if it is not in the record, it did not happen

1) Waivers

2) Agreements or stipulations

3) Rule 17.6 waiver regarding admission of prior convictions

a) Need a complete colloquy; specify *all* constitutional rights waived

b) Range of sentence both with and without prior convictions

c) Always admit certified judgments of conviction even if defendant admits priors so there can be no "prejudice"

B) Recordings and Written Excerpts read into evidence

1) Either get court reporter to transcribe all recordings played at trial OR have a written transcript – *including* all redactions – prepared and admitted for purposes of the record (even if it does not go to the jury) AND retain a copy for County Attorney file to provide to Attorney General's office on appeal

a) Especially important for recorded recollection under Rule 803(5) of the Rules of Evidence because the writing or recording may *not* be admitted in evidence and court reporters rarely transcribe

C) Specific findings of forfeiture, waiver, and agreement on record

1) Request that trial courts make specific findings of forfeiture, waiver and agreement on the record

a) Can be used to prove invited error or forfeiture on appeal, or independent state grounds on federal habeas review

b) Better yet, have defense counsel state waiver or agreement on the record

D) Untimely Motions

1) Even if trial court is inclined to address the merits of a claim, request that it first deny the motion as untimely, *then* alternatively reject it on the merits

a) Allows us to argue the timeliness issue on appeal

b) An independent state law ground on federal habeas review

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ATTACHMENT

A

Tom Horne
Attorney General

Office of the Attorney General
State of Arizona
CRIMINAL APPEALS /CAPITAL LITIGATION

Kent E. Cattani
Chief Counsel

November 17, 2011

Ms. Constant, Danielle Kamps
Pima County Attorney's Office
1400 Legal Services Bldg., 32 N. Stone
Tucson, AZ 85701-1412

Re: *State v. Arnaldo Zepeda*
CR 2010-3954
Our File 2011-1191

Dear Ms. Constant:

Enclosed is Appellant's opening brief in the above case, which your office prosecuted at the trial level. The Assistant Attorney General assigned to this appeal is:

Joe Maziarz
Phone: 602-542-4686

We would like you to review the issues raised by Appellant and let us know if you have any comments about them. You must do this by **December 19, 2011**. Although we encourage you to call us at any time with your comments, unless they are received by that date, we may not be able to consider them in the preparation of our brief.

If audio or video cassette tapes were admitted in evidence at trial, please provide copies of these and any transcripts to our office; if unavailable, please notify us promptly so that we can take steps to obtain duplicates from the superior court as soon as possible.

Sincerely

Kent E. Cattani

KENT E. CATTANI
Chief Counsel
Criminal Appeals/ Capital Litigation Section

ATTACHMENT

B

RICHARD M. ROMLEY
MARICOPA COUNTY ATTORNEY

Jeff Trudgian
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs. Martin Manriquez-Reyes, Defendant.	No. CR 2009-006934-001 DT NOTICE OF CROSS-APPEAL (Assigned to the Honorable John R. Hannah, Jr.)

The State of Arizona, by and through undersigned counsel, hereby gives notice that it cross-appeals from the trial court's decision to allow defense counsel to cross-examine State's witness Wendy Dutton regarding alleged "false victim reporting" data. This cross-appeal is filed pursuant to A.R.S. § 13-4032(3).

Submitted November 4th, 2010.

RICHARD M. ROMLEY
MARICOPA COUNTY ATTORNEY

BY _____
Jeff Trudgian
Deputy County Attorney

Copy of the foregoing mailed this
4th day of November, 2010,
to:

The Honorable John R. Hannah, Jr.
Judge of the Superior Court

Jeffrey Swierski
2828 N. Central Ave., Ste. 890
Phoenix, AZ 85004-1025
Defendant's Trial Counsel

Public Defender's Office
620 W. Jackson, Ste. 4015
Phoenix, AZ 85003
Appellate Attorneys for Defendant

BY _____
Jeff Trudgian
Deputy County Attorney

ATTACHMENT

C

Rule 31.19(c)(3) of the Arizona Rules of Criminal Procedure:

> The petition shall contain concise statements of the following:
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> . . .
>
> 3. The reasons the petition should be granted, which may include, among others, the fact that no Arizona decision controls the point of law in question, that a decision of the Supreme Court should be overruled or qualified, that conflicting decisions have been rendered by the Court of Appeals, or that important issues of law have been incorrectly decided.

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D

Rule 10 of the Rules of the Supreme Court of the United States:

Rule 10. Considerations governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.